

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

WT Docket No. 08-165

Petition for Declaratory Ruling to Clarify  
Provisions of Section 332(c)(7)(B) to Ensure  
Timely Siting Review and to Preempt under  
Section 253 State and Local Ordinances that  
Classify All Wireless Siting Proposals as  
Requiring a Variance

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COMMENTS OF THE CITY OF AUSTIN

These Comments are filed by the City of Austin to urge the Commission to deny the Petition for Regulatory Ruling filed by CTIA-The Wireless Association on July 11, 2008 ("CTIA"). The City of Austin also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253.

Section 332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services;  
and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 on the other hand provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 addresses telecommunications generally.

Congress does not enact redundant code provisions. Further, the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 332(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance." The word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in the City of Austin.

## 1. LEGAL REQUIREMENTS FOR FACILITY SITING

The City of Austin has a specific ordinance to address wireless facility siting. The ordinance was enacted on March 2, 2000.

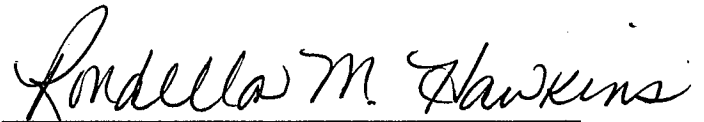
## 2. NUMBER OF APPLICATIONS AND OUTCOMES

Between 2001 and 2008, the City of Austin had 94 applications for approval of new wireless telecommunications facilities that required site plan approval. Initial submittals have a 14-day review period and update submittals have 10-day reviews. Site exemptions for co-location are approved in 2 days and approval of site plan corrections average one week.

### 3. CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,



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